United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1408

B
P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISADORE MARION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the use of the State Ordered wiretap tapes in the Federal Grand Jury and during the Federal trial requires dismissal of the indictment and reversal of the conviction.

2. Whether, in holding that there was not recantation as a matter of law, the Court improperly usurped the province of the jury.

3. Whether 18 U.S.C. § 1503 contemplated MARION'S actions as an obstruction of justice.

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This is an appeal from a Judgment and Conviction of the United States District Court for the Southern District of New York, the Honorable WILLIAM C. CONNER, Judge, wherein the Appellant ISADORE MARION was placed on probation for a term of three years after imposition of sentence was suspended.

B.

STATEMENT OF THE FACTS

A three-count indictment was returned in the United States District Court for the Southern District of New York charging MARION with violating 18 U.S.C. 1623 (Count One) and 18 U.S.C. 1503 (Counts Two and Three) (4a-22a). In essence MARION'S testimony before a grand jury in said District on two separate occasions, December 20, 1973, and January 8, 1974, was deemed to have been inconsistent (18 U.S.C. 1623) and evasive (18 U.S.C. 1503), according to the Government's theory of the indictment (53a).

Prior to the December 20, 1973, grand jury appearance by MARION an ex parte use immunity order was issued which read:

> "It is further ordered that pursuant to the immunity provision of Title 18, United States Code, Section 6002, no testimony or

other information compelled from ISADORE MARION, pursuant to this Order, or any information directly or indirectly derived from such testimony, may be used against ISADORE MARION in any criminal case except a prosecution for perjury or for contempt as described in the last sentence of Title 18, United States Code, Section 6002." (68a-69a).

When MARION was examined before the grand jury on December 20, 1973, and January 8, 1974, he was questioned about his participation in two conversations that had been electronically intercepted. One of these conversations involved MARION and one JACK DINERO and concerned transportation of a hand gun. The other involved MARION and one VINCENT TORTORA and concerned the damaging of truck transmissions of a third person (99a-177a).

Each of the conversations had been intercepted pursuant to orders issued by a Justice of the Supreme Court of the State of New York which authorized the New York County District Attorney to conduct the surveillances (36a-38a).

The monitoring and recordation of the "MARION-DINERO" conversation was predicated on the State Court Order authorizing the interception of communications for evidence of the crime of possession of dangerous weapons as a felony (Art. 265, New York State Penal Law). The monitoring and recordation of the "MARION-TORTORA" conversation was predicated on the State Court Order authorizing the interception of communications for evidence of

the crimes of grand larceny by extortion, felonious assault and conspiracy to commit those crimes (Art. 155, 120 105, New York State Penal Law) (36a-38a).

The transaction concerning the transportation of the weapon was the subject matter upon which questions were propounded, the answers to which resulted in the grand jury's returning the indictment on Counts One and Two; the damaging of the transmission being the subject matter upon which questions were based resulting in responses which gave rise to Count Three of the indictment (4a-22a).

At no time was MARION advised, during or between December 20, 1973, and January 8, 1974, that he could recant his testimony to avoid the prosecution which ensued.

The Government's proof at the trial consisted in the reading of MARION'S testimony before the grand jury on December 20, 1973, and January 8, 1974, together with the playing of the aforedescribed intercepted taped conversations (97a-1).

Judge CONNER advised MARION, after the Court had reviewed the grand jury transcript of December 20, 1973, and transcript of January 8, 1974, that the Court would not permit MARION to testify to his defense of "recantation" (180a, 185a). Having precluded MARION from testifying as to recantation, MARION had no defense when the case was submitted to the jury, since consistent with its earlier ruling the Court effectively precluded any instruction as to recantation to be given to the jury (179a-180a, 185a).

MARION was found guilty of all three counts of the indictment. He was granted probation for a term of three years, imposition of his sentence having been suspended (96a).

It is from the judgment and conviction that MARION now takes this appeal.

APPELLANT'S STATUS

MARION is presently on probation.

ARGUMENT

I.

THE USE OF THE STATE ORDERED WIRETAP TAPES IN THE FEDERAL GRAND JURY AND DURING THE FEDERAL TRIAL REOUIRES DISMISSAL OF THE INDICTMENT AND REVERSAL OF THE CONVICTION.

Section 2517(5) of Title 18 U.S.C. restricts the use of intercepted wire or oral communications concerning criminal activities not specified by order of authorization or approval for the original wiretap. Unless a judge of competent jurisdiction finds upon timely and appropriate application by the Government, that the contents of the communications were otherwise intercepted in accordance with the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq., the intercepted communications may not be used or disclosed.

The Appellant ISADORE MARION, was subjected to questions before a Federal Grand Jury on December 20, 1973, and January 8, 1974. MARION was questioned about his participation in two conversations that had been electronically intercepted pursuant to orders issued by a state court judge which authorized a county district attorney to conduct surveillance solely into alleged violations of New York State Statutes (36a-38a).

The inquiry by the Federal Grand Jury directed itself to violations of Federal law (4a, 6a and 12a), however, the state tapes and evidence derived therefrom formed the basis for the Federal proceeding before the Federal Grand Jury. No judicial approval was obtained relating to the use of the tapes for investigation into potential Federal criminal violations. Nor, was there any Federal judicial approval for the playing of the state authorized tapes during MARION'S Federal trial.

In responding to MARION'S pre-trial motion to dismiss, the Government maintained that the "intercepts in question fell within the ambits of the orders that initially authorized the surveillances," (36a) although the Government candidly admitted that the surveillances were conducted to glean evidence of state crimes (as distinct from Federal offenses).

The Court denied the relief sought by MARION by concluding that the "intercepted communications clearly related to the crimes designated in the orders of authorization." (90a).

It was the Government's view that it is not necessary to secure prior judicial approval to divulge the Federal criminal

activity to the Federal Grand Jury since the activity was intercepted under the state court authorization. In addition, the Government hinted that there was no Section 2517(5) violation because the section does not contemplate grand jury proceedings to be within its purview.

Congress, by promulgating Section 2517(5), authorized the disclosure and use of interceptions in evidence, save and except where the intercepted communication related to offenses other than those specified in the original order. In the latter situation, a second application is required to be made to a judge of a competent jurisdiction for permission to disclose such evidence of other offenses in a grand jury proceeding (c.f. 18 U.S.C. 2517(3)).

The Government has argued that it is not obligated to make the application under Section 2517(5) because the evidence secured under the "state crime" order and authorization and uses in that wiretap applies equally as well to the Federal crimes intercepted.

In a most analagous situation, a former United States Supreme Court Justice has just recently opined in United States v. Brodson, No. 75-1452 (7 Cir., 12/15/75) that:

> "This is of no consequence here because the two offenses are wholly separate and distinct; they involve dissimilar elements and require different evidence, even though some of it might overlap because both concern illegal gambling. [18

U.S.C. 1955 and 18 U.S.C. 1084 being the pertinent statutes in Brodson, supra.] The controlling factor here, however, is not the dissimularity of the offenses, but the fact that the Government itself has violated the key provision of the legislative scheme of Section 2515 [of Title 18 U.S.C.], in that it did not comply with the mandate of Section 2517(5)."

The Brodson Court upheld the dismissal of the indictment and noted that it understood the ramifications of its decision, but in doing so noted that dismissal is the remedy approved by the overall policy of Title III, c.f. United States v. Giordano, 416 U.S. 505 (1974).

In United States v. Campagnuolo, WPB 75-36-Cr-CF (S.D. Fla., 12/31/75), the Court suppressed wiretap evidence and dismissed the indictment, where orders issued for violations of 18 U.S.C. 1955 were used during a grand jury investigation into violations of 18 U.S.C. 1084, 1952 and 2, without Section 2517(5) approval. In so doing the Court noted that Section 2517 is:

"'designed to avoid electronic fishing expeditions and other abuses by requiring the prosecution to come forward with evidence of offenses other than those specified by the court in the original electronic surveillance

authorization - but obtained pursuant thereto - 'as soon as practicable.' Subsection (3) provides temporal reference insofar as it refers to 'any proceeding held under the authority of the United States;' in this way the court can evaluate the propriety of evidence of unspecified offenses prior to its use in any such proceeding.'" [Citing United States v. Brodson, 393 F.Supp. 621 (E.D. Wisc., 1975)].

It is submitted that MARION'S motion to dismiss should properly have been granted as the appropriate remedy for the Government's violation in the instant case.

II.

IN HOLDING THAT THERE WAS NOT RECANTATION AS A MATTER OF LAW, THE COURT IMPROPERLY USURPED THE PROVINCE OF THE JURY.

After the Government rested its case in chief, MARION'S counsel asked the Court to rule ". . . on the question of whether or not recantation under Section 1623 [18 U.S.C. 1623] is a defense" (179a). The Court stated that since MARION "never admitted that [his testimony during his December 20, 1973, appearance] was false" (179a), the Court was of the mind " . . . that as a matter of law there was no recantation in this case within the intent of Section 1623" (180a). MARION'S counsel argued to no

avail that recantation is a factual question for the jury (180a). The Court determined that the resolution of the issue was best left to the Court of Appeals (185a). MARION, therefore, was effectively precluded from arguing any defense before the jury.

A defendant in a criminal case is entitled to have his theory of defense be considered by the jury, no matter how weak the Court may deem the evidence to be. United Brotherhood of Carpenters and Joiners v. United States, 330 U.S. 395 (1947). The jury must determine by its verdict whether the truth rests with the prosecution or the defense. United States v. Zanfardino, 496 F.2d 887 (2 Cir., 1974), citing United States v. Taylor, 464 F.2d 240, 243 (2 Cir., 1972) for the standard that "It is the province of the jury to 'weigh the evidence and draw justifiable inference of fact.'"

The defense MARION intended to rely upon was founded in the pertinent language of 18 U.S.C. 1623(d):

> "Where, in the same continuous . . . grand jury proceeding in which a declaration is made, the person admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made . . . it has not become manifest that such falsity has been or will be exposed."

It is submitted that the very nature of the answer to the question propounded which formed the underlying basis for

the charge reflected in Count I, could be established only by MARION'S thought process being reflected. In simplest of terms the question to which he gave inconsistent answers was "What were you going to do with this unregistered gun?" (5a).

As was reflected by MARION'S answer to the question on December 20, 1973, he indicated that he wanted "just to have another pistol around the house." (5a). On January 8, 1974, MARION recanted, by telling the truth, since it can be reasonably inferred that his testimony was couched as a declaration against penal interests that he was going to sell the "unregistered gun for a lot of money." (5a). He made it clear that his answer on January 8, 1974, was emphatic and truthful, notwithstanding the nature of his answer of December 20, 1973, by engaging in the following colloquy:

"Q. Your testimony is that you wanted this gun so that you could sell it?

A. Yes, Sir.

Q. You are clear on that?

A. Yes, Sir.

Q. There is no doubt in your mind about that?

A. No, Sir.

Q. You weren't going to use it for yourself?

A. No, Sir." (5a).

It is clear that the purpose of Congress in enacting the Organized Crime Control Act's section relating to false declarations before a grand jury was "obviously to induce the witness to give truthful testimony by permitting him to voluntarily correct a false statement without incurring the risk of prosecution for doing so." United States v. Del Toro, 513 F.2d 656 (2 Cir., 1975).

There was no reasonable likelihood that MARION would believe that his testimony of December 20, 1973, pertaining to the reason MARION wanted the gun would ever be discovered by the Government, since only MARION knew the reason for which he wanted the gun. There was no external factor which could have been learned by the authorities which could refute MARION'S declaration of January 8, 1974. Furthermore, the wiretap materials which had been made available prior to MARION'S December 20, 1973, appearance (112a) contained nothing which would have reflected MARION'S subjective thought as for what he ultimately desired the weapon.

Using the only opportunity available to him (i.e. January 8, 1974) for recantation, MARION did so by disclosing the truth before the grand jury. To have prohibited the jury consideration of the question as to whether or not MARION intended to recant deprived him of having the ultimate issue determined by his peers.

III.

TITLE 18 U.S.C. 1503 DID NOT CONTEMPLATE MARION'S ACTIONS AS BEING AN OBSTRUCTION OF JUSTICE..

It is submitted that MARION'S response to the questions posed to him during his appearances of December 20, 1973, and January 8, 1974, before the grand jury is not the type of activity contemplated by Congress in its enactment of 18 U.S.C. 1503, 1968 U.S. Code Cong. and Adm. News, p. 4252.

Recognizing the holding of United States v. Cohn, 452 F.2d 881 (2 Cir., 1971), as speaking to the issue in determining that concealment of information relevant and germane to the grand jury's functions was within the intendment of acts prohibited by the statute, it is postulated by MARION that testimony such as that offered by MARION (103a-176a) in and of itself does not constitute an obstruction of justice.

"It is now well beyond dispute that false testimony alone will not amount to contempt of court." United States v. Essex, 407 F.2d 214, 217 (6 Cir., 1969). Before a conviction may lie, there must be proved that the defendant's act had impeded the grand jury in the conduct of its business, in a manner beyond the mere rendering of false testimony, since neither the language of 18 U.S.C. 1503 nor its purpose makes the rendering of false testimony alone an obstruction of justice.

If in fact MARION'S testimony was material to the investigation conducted by the grand jury, an issue vehemently challenged by the Appellant (181a-184a), his testimony which is

the subject of Count Two was not evasive, but rather was inconsistent. The inconsistency was cured by the candor of his testimony during his January 8, 1974, appearance (See Argument II, supra) and whatever confusion existed to MARION'S intent and motivation in utilizing the weapon was resolved in his latter appearance.

As a result of MARION'S obvious lack of sophistication, MARION was unable to couch his responses to the prosecutor in the grand jury, in an acceptable manner. MARION frankly stated that he asked VINCENT TOTORA to "mess up" a Mr. CAPAZZO'S trucks (13a) in order to try to influence a vote regarding a company with which MARION was associated (14a). MARION indicated that the request of TOTORA was unilateral and others were not involved (16a) and that his choice of expression was in the nature of "puffing" (17a), and in fact MARION was acting to impress TOTORA because he thought TOTORA was connected with "organized crime." (22a).

MARION was unable to respond in a satisfactory manner to appease the prosecution as to the purpose of the aforedescribed vote, nor could he explain what motivated him to "puff." It is submitted that such is not the stuff of which evasion is made.

CONCLUSION

For the reasons hereinbefore stated, it is respectfully requested that the judgment of conviction entered in District Court be reversed with instructions to dismiss the indictment.

Respectfully Submitted:

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CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that two (2) true and correct copies of the above and foregoing OPENING BRIEF OF APPELLANT, together with one true and correct copy of the APPENDIX thereto, was, on this 19th day of January, 1976, mailed, postage prepaid, to CARL M. BORNSTEIN, Special Attorney, United States Department of Justice, Organized Crime & Racketeering Section, One St. Andrew's Plaza, New York, New York 10007.

_____
OSCAR B. GOODMAN, ESQ.